



DEPARTMENT OF THE ARMY
UNITED STATES ARMY LEGAL SERVICES AGENCY
901 NORTH STUART STREET
ARLINGTON, VA 22203-1837

JALS-ZA

17 September 2007

MEMORANDUM FOR THE DOD GENERAL COUNSEL

SUBJECT: Role of the Legal Advisor to the Convening Authority of the Office of Military Commissions (OMC)

1. Appointment: A team was appointed in accordance with the DOD/GC memorandum dated 6 September 2007 to examine the role of the Legal Advisor to the Convening Authority of the Office of Military Commissions. The team was composed of BG Clyde J. Tate II, USA, team chief; Brig Gen Richard C. Harding, USAF, team member; CAPT Hal H. Dronberger, JAGC, USN, team member; and SSG [REDACTED] recorder. In accordance with the letter of appointment, the team was directed to conduct an assessment and make findings and recommendations regarding the organization, effectiveness, and proper role of the office of the Legal Advisor to the Convening Authority of the Military Commissions and its supervisory relationship over, and interaction with, the Office of the Chief Prosecutor for the Military Commissions. The team did not consider issues raised during the assessment that were outside the scope of its charter, specifically [REDACTED]

2. Background. This assessment was prompted by a complaint from Colonel Morris Davis, Chief Prosecutor, Office of the Military Commissions (OMC), that the Legal Advisor, OMC, exceeded his authority in dealings with the prosecutors within the Office of the Chief Prosecutor responsible for the prosecution of the Non-High Value Detainees by, *inter alia*, requesting detailed information of pending cases, defining the sequence in which cases would be brought forward, implementing an advocacy training program for prosecutors in the OMC, bringing in outside military counsel to review the cases, and expressing an intent to personally conduct pretrial agreement negotiations with defense counsel.

3. Assessment Process: The assessment team convened 7-10 September 2007.

a. The team obtained statements from the following persons:

1. Brig Gen Thomas Hemingway, USAF (Ret.), Legal Advisor to the Appointing Authority and later Legal Advisor to the Convening Authority, Aug 03 – May 07 (Tab L)
2. Brig Gen Thomas Hartmann, USAF, Legal Advisor to the Convening Authority, Jul 07 – present (Tab M)
3. Col Morris Davis, USAF, Chief Prosecutor, Office of the Chief Prosecutor, OMC (Tab N)

JALS-ZA

SUBJECT: Role of the Legal Advisor to the Convening Authority of the Office of Military Commissions (OMC)

4. [REDACTED] Prosecutor, Non-High Value Detainees (Tab O)
5. [REDACTED] Deputy Chief Prosecutor, Non-High Value Detainees (Tab P)
6. [REDACTED] Deputy Legal Advisor (Tab Q)

b. The team spoke for background with the following persons not directly involved in the complaint:

1. The Honorable Susan J. Crawford, Convening Authority, OMC
2. [REDACTED] Deputy Chief Prosecutor, High Value Detainees, OCP

c. The team examined the following documents:

1. Military Commissions Act of 2006, PL 109-366, dated 17 Oct 06
2. Manual for Military Commissions, 18 Jan 07
3. Regulation for Trial by Military Commissions, 27 Apr 07
4. Memo, 27 Aug 07 (Judge Crawford) (Tab C)
5. Memo, 30 Aug 07 (Col Davis) (Tab D)
6. Memo, 30 Aug 07 [REDACTED] (Tab E)
7. Addendum to 23 Aug 07 Complaint, 29 Aug 07 (Col Davis) (Tab F)
8. Memo, 23 Aug 07, (Col Davis) (Tab G)
9. Emails provided to the team by Col Davis:
 - a. Email, dated 17 Aug 07, 4:24 p.m., Subject: Question (Tab H)
 - b. Email, dated 17 Aug 07, 10:25 a.m., Subject: Security Concerns (Tab I)
 - c. Email, dated 18 Jul 07, 11:48 a.m., Subject: RE: Request for Assistance (Tab J)
 - d. Email, dated 13 Jul 07, 12:50 a.m., Subject: Case Summaries (Tab K)

4. Findings:

a. The OMC, and specifically the Office of the Legal Advisor and the Office of the Chief Prosecutor, consists of dedicated, bright, and skilled personnel committed to their respective missions. Each person with whom we dealt in those offices brings a passion to their work, is totally dedicated to the task at hand, and is focused on the very challenging mission assigned them. All have willingly made personal and professional sacrifices in support of this historic undertaking. How they approach and define their roles in this undertaking, however, is a matter of disagreement between the Legal Advisor and the Office of the Chief Prosecutor.

b. In his complaint, Colonel Morris Davis, Chief Prosecutor, OMC, maintains that the Legal Advisor to the OMC has a narrow charter: "The Legal Advisor's sole duty is to provide legal advice to the Convening Authority." Davis Statement, page 26, line 21-22. Colonel Davis did not believe that the role of the Legal Advisor included oversight of the performance of his duties. Davis Statement, page 35-36, line 15-2. By contrast, Brigadier

JALS-ZA

SUBJECT: Role of the Legal Advisor to the Convening Authority of the Office of Military Commissions (OMC)

General Thomas Hartmann, Legal Advisor to the Convening Authority, OMC, perceives a broader role for the Legal Advisor. He believes the role consists of “two elements”: (1) giving legal advice to the Convening Authority; and (2) supervising the Chief Prosecutor. Hartmann Statement, page 2-3. These contrasting views underlie Colonel Davis’ complaint.

c. Neither Colonel Davis nor General Hartmann were given appointing orders at the time they reported for duty with the OMC. Davis Statement, page 12, line 11-16; Hartmann Statement, page 2-3, line 11-5. Brigadier General Thomas Hemingway, who was General Hartmann’s predecessor as Legal Advisor to the Convening Authority, also did not receive an appointing order. Hemingway Statement, page 3, line 7-19.

d. General Hemingway viewed his role as being similar to the staff judge advocate for a military convening authority. Hemingway Statement, page 3, line 17-18. This comports with General Hartmann’s views (page 27, lines 14-15) and the guidance provided by the Rules for Military Commissions (RMC) 103(a)(15).

e. According to RMC 103(a)(15), the Legal Advisor to the Convening Authority of the Office of Military Commissions is “an official appointed by authority of the Secretary of Defense who fulfills the responsibilities of that position, as delineated in [the Manual for Military Commissions], and otherwise provides legal advice and recommendations to the convening authority, similar in nature to that provided by a staff judge advocate under the [Uniform Code of Military Justice].”

f. The Legal Advisor assists the Convening Authority of the OMC in carrying out her duties under the Military Commissions Act (MCA) of 2006 and the rules and regulations promulgated pursuant to that Act. As General Hartmann described these duties, the Legal Advisor gives “advice to the Convening Authority based upon a review of the charges and charge sheet that are presented by the prosecutor’s office, and the goal there is to determine whether there is jurisdiction, whether a crime has been committed – a war crime has been committed under the MCA and whether there is probable cause to proceed with that.” Hartmann Statement, page 3, line 8-16.

g. Generals Hemingway and Hartmann also believe that the Legal Advisor may be involved in the pretrial agreement process. In fact, RMC 705(d) states, “Pretrial agreement negotiations may be initiated by the accused, defense counsel, trial counsel, *the legal advisor* (emphasis added), convening authority, or their duly authorized representatives.” According to this, the Legal Advisor may speak to defense counsel and negotiate possible terms. Indeed, General Hemingway did just that when he negotiated a pretrial agreement with [REDACTED] in the Hicks case. Hemingway Statement, page 7-8. Likewise, General Hartmann believes that he can initiate, negotiate, and conclude a pretrial agreement in a military commission case. Hartmann Statement, page 16-17, line 13-8.

JALS-ZA

SUBJECT: Role of the Legal Advisor to the Convening Authority of the Office of Military Commissions (OMC)

h. Colonel Davis contends that since the MCA does not specifically refer to the Legal Advisor, the working relationship between the Chief Prosecutor and the Legal Advisor in the Office of Military Commissions is not similar to the working relationship between the trial counsel and the staff judge advocate in military commands. Davis Statement, page 13-14, line 17-3. Colonel Davis further believes that the “reporting” relationship of the Chief Prosecutor to the Legal Advisor is limited to preparing the officer performance report evaluation, but does not include supervisory responsibilities. Davis Statement, page 46, line 6-15. When asked who he thought he worked for, Colonel Davis said, “I think I work for the Secretary of Defense, but I don’t know.” Davis Statement, page 9, line 17-19.

i. As previously mentioned, General Hartmann views his supervisory responsibilities more broadly. In support of that belief, General Hartmann cites section 8-6 of the Regulation for Trial by Military Commissions (hereinafter Regulation). Hartmann Statement, page 3, line 14-16. Regulation 8-6 describes the relationship between the Chief Prosecutor and the Legal Advisor: “The Chief Prosecutor shall report to the legal advisor to the convening authority.” The term “report” is also defined in Regulation 8-6: “Unless stated otherwise, the person to whom an individual “reports” . . . shall be deemed to be such individual’s supervisor. . . .”

j. General Hartmann sees the Legal Advisor’s role as being the supervisor of the Chief Prosecutor under section Regulation 8-6 (b) and (c). Hartmann Statement, page 3, line 14-16.

k. Colonel Davis contends that Section 949b of the MCA prevents General Hartmann, in his role as Legal Advisor, from unduly influencing his exercise of prosecutorial discretion, especially in regard to the particular cases that are tried before military commissions. Davis Statement, page 35, line 2-9. Subsection 949b(a)(2)(C) prohibits any person from coercing or, by any “unauthorized means”, influencing “the exercise of professional judgment by trial counsel or defense counsel.”

5. Assessment of the Legal Advisor’s Role:

a. To provide legal advice to the Convening Authority, the Legal Advisor must have substantial personal knowledge of the charges against individuals to be tried by Military Commissions as well as an understanding of the relevant evidence supporting those charges.

(1) The Legal Advisor to the Convening Authority is more than just a passive actor in the Commission’s process; he must take affirmative steps to educate himself about the identity and background of the accused, the strengths and weaknesses of the preferred offenses, the particular evidence to be used against the accused at trial, and how, if at all, the use of that evidence at trial will affect national security.

(2) To properly perform this role, the Legal Advisor must have access to attorneys, documents, and other relevant information in the possession of the Office of the Chief Prosecutor, OMC. Without an appropriately coordinated effort between the Chief Prosecutor and the Legal Advisor, the Convening Authority will lack information necessary to determine the course of potential prosecutions.

b. The Legal Advisor to the Convening Authority of the OMC is the reporting senior for the Chief Prosecutor of the Office of Military Commissions. This includes the duty to provide performance appraisals of the Chief Prosecutor and to supervise the effectiveness, efficiency, and fitness of the Chief Prosecutor. Additionally, the Legal Advisor must remain informed about the underlying facts and supporting evidence necessary for trial of accused by military commissions. This requires a close working relationship between the Legal Advisor and the Office of the Chief Prosecutor. Nevertheless, the Legal Advisor must diligently avoid aligning himself with the prosecutorial function so that he can objectively and independently provide cogent legal advice to the Convening Authority on matters within her cognizance; otherwise, the Legal Advisor may disqualify himself from providing competent legal advice by having acted in essence as a trial counsel. (See also RMC 406 and 1106 for a discussion of the Legal Advisor's role in providing advice to the Convening Authority at different stages of an OMC proceeding.). This is especially true when the Legal Advisor is involved in pretrial agreement negotiations.

c. Col Davis argues that the failure of the MCA to specifically outline a supervisory role for the Legal Advisor over the OCP in a fashion similar to the supervisory role of a SJA over a trial counsel means that no such role can be attributed to a Legal Advisor in the OMC; this argument is without merit. The argument fails to consider that the Secretary has authority under the MCA (949a(c)) to prescribe regulations and he has done so in Regulation 8-6 that authorizes the Legal Advisor to supervise the Chief Prosecutor.

d. The language of 949b of the MCA focuses on coercion or "unauthorized" influence over the trial counsel's professional judgment. But other pertinent rules and regulations, especially Regulation 8-6, specifically authorize the exercise of supervision by the Legal Advisor over the Chief Prosecutor. None of the prosecutors within the Office of the Chief Prosecutor were subject to unauthorized influence or coercion by General Hartmann. The fact that the MCA is silent in regard to the supervisory role of the Legal Advisor over the OCP does not mean that the Secretary of Defense lacked the authority when promulgating the Manual for Military Commissions to authorize the Legal Advisor to supervise the OCP, and he did so in Regulation 8-6. Therefore, the team concluded that General Hartmann did not violate the MCA, 10 U.S.C. § 949b, in that his actions as supervisor did not attempt to "coerce" or "in an unauthorized fashion, influence" the professional judgment of a trial counsel.

e. While there was disagreement about the nature of the reporting relationship between the Chief Prosecutor and the Legal Advisor, there was no indication that the organization of the OMC contributed to the disagreement or to this complaint. While we did not find reason to doubt the effectiveness of the LA or the OCP, the current tensions, left

JALS-ZA

SUBJECT: Role of the Legal Advisor to the Convening Authority of the Office of Military Commissions (OMC)

unabated, will likely impact adversely the effectiveness of both offices and, potentially, the OMC.

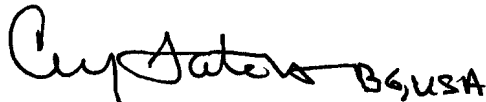
6. Recommendations:

a. Provide an appointing order for the Convening Authority, the Legal Advisor, the Chief Prosecutor, and the Chief Defense Counsel.

b. Describe the reporting and supervisory relationships of these officials within the appointing orders.

c. While the Legal Advisor is authorized to initiate pretrial negotiations, he should do so with careful consideration to avoid disqualifying himself to serve further as the Legal Advisor in that case.

d. The Legal Advisor and counsel within the OCP should be briefed on their roles, responsibilities, and supervisory relationships, and their questions and concerns should be addressed consistent with this Assessment.

Handwritten signature of Clyde J. Tate II in black ink, followed by the text "BG, USA".

CLYDE J. TATE II
BG, USA